

Decision Notice

Decision 215/2014: Ms Linda Nicholson and Scottish Borders Council

Sports facilities at Peebles High School

Reference No: 201401615

Decision Date: 7 October 2014



Scottish Information
Commissioner

Summary

On 8 April 2014, Ms Nicholson asked Scottish Borders Council (the Council) for information concerning alterations to plans for new sports facilities at Peebles High School.

The Council disclosed information to Ms Nicholson, but withheld some information on the basis that it comprised personal data which was exempt from disclosure in terms of section 38(1)(b) of FOISA.

The Commissioner investigated and found that the Council did not hold any recorded information falling within the scope of Ms Nicholson's request and that it had breached Part 1 of FOISA by failing to tell Ms Nicholson that this was the case.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 8 April 2014, Ms Nicholson made a request for information to the Council. The request concerned decisions taken regarding plans for the new sports facilities at Peebles High School, in particular relating to the long jump and high jump areas. Ms Nicholson asked for written documentation from the Council showing the reasons for the change between the final plans (as attached to an email from the Capital Projects Officer on 6 March 2012) and those subsequently submitted to sportscotland.
2. The Council did not respond. On 10 May 2014, Ms Nicholson emailed the Council requiring a review of its failure to respond.
3. The Council did not respond to Ms Nicholson's requirement for review. The Commissioner subsequently issued *Decision 148/2014 Linda Nicholson and Scottish Borders Council*¹ finding that the Council had breached Part 1 of FOISA in failing to respond to Ms Nicholson's request and requirement for review.
4. The Council notified Ms Nicholson of the outcome of its review on 19 June 2014. The Council disclosed information comprising emails and meeting notes regarding the new sports facilities. The Council withheld some personal information on the basis that it was exempt from disclosure in terms of section 38(1)(b) of FOISA.
5. On 15 July 2014, Ms Nicholson wrote to the Commissioner. Ms Nicholson applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Nicholson stated she was dissatisfied with the outcome of the Council's review because the information disclosed

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201401273.aspx>

to her did not contain the information that she was seeking. Additionally, she was dissatisfied that the Council had withheld information under the exemption in section 38(1)(b) of FOISA.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Ms Nicholson made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 29 July 2014, the Council was notified in writing that Ms Nicholson had made a valid application. The Council was asked to send the Commissioner the information withheld from her. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
9. At this stage, the investigating officer pointed out to the Council that none of the information disclosed to Ms Nicholson appeared to fall within the scope of her request as it did not appear to relate to decisions taken regarding the jump areas. The Council was asked to comment on this. Additionally, the Council was asked to explain the searches it had undertaken in order to locate and retrieve any relevant information falling within the scope of Ms Nicholson's request.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Ms Nicholson and the Council. She is satisfied that no matter of relevance has been overlooked.

Whether the Council holds any relevant information

11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which hold it is entitled to be given the information by the authority. This is subject to qualifications which, by virtue of section 1(6), allow authorities to withhold information or charge a fee for it. These qualifications are not relevant here.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
13. As noted above, the Council provided information to Ms Nicholson on 19 June 2014. The information comprised notes and emails regarding the new sports facilities. The Council redacted information which it considered to be personal data in terms of section 38(1)(b) of FOISA.
14. In its submissions to the Commissioner, the Council stated that it had previously been in correspondence with Ms Nicholson and had explained its reasons for the relevant changes in the design of the facilities. The Council stated that site constraints, limited working space, the need for disabled access and the results of the public consultation all impacted on the final delivery of the project. The Council understood the decision regarding the jump areas had

been taken in June/July 2012, but could not provide a more specific date given the time that had subsequently passed.

15. The Council also explained that, when it received Ms Nicholson's information request, it had interpreted it as a request for additional information, i.e. documentation generated during the design development process. The Council stated that, in the absence of any documentation relating specifically to the jump facilities and showing in detail the precise reasons for the change in plans, it decided to assist Ms Nicholson by providing information which illustrated the design rationalisation process. In the Council's view, although the information that it disclosed did not directly address Ms Nicholson's request, it was broadly pertinent to her concerns and provided her with an explanatory background.
16. The Commissioner has considered the Council's submissions, its explanation of the searches undertaken and its explanation of why it does not hold any recorded information directly falling within the scope of Ms Nicholson's request. The Commissioner is satisfied that the Council has conducted proportionate searches to establish whether it holds any relevant, recorded information. Whilst the Commissioner is surprised that the Council did not keep a record of changes of this nature, she has accepted that it does not hold any relevant, recorded information falling within the scope of the request.
17. The Commissioner recognises that the Council was attempting to be helpful by disclosing information to Ms Nicholson regarding the general development process of the facilities. However, it is clear to the Commissioner that the Council did not actually hold any recorded information falling within the scope of the request. In such circumstances, the appropriate response from the Council should have been that no recorded information was held. By failing to provide notice to this effect (as required by section 17(1) of FOISA), the Commissioner finds that the Council failed to comply with Part 1 of FOISA.
18. The Commissioner notes that her remit in carrying out this investigation extends to the consideration of whether the Council actually holds the specific information sought by Ms Nicholson. She cannot comment on whether a public authority should have recorded any, or more, information about a particular event or process. Consequently, she cannot comment on whether the Council ought to hold further recorded information on this occasion.
19. Given that the Commissioner finds that none of the information provided to Ms Nicholson fell within the scope of her request, she cannot go on to consider whether the Council was correct to withhold personal data from that information under the exemption in section 38(1)(b) of FOISA, as requested by Ms Nicholson in her application for a decision.

Decision

The Commissioner finds that Scottish Borders Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Ms Nicholson by failing to give notice, in terms of section 17(1), that it did not hold the requested information.

The Commissioner does not require the Council to take any action in response to this failure in response to Ms Nicholson's application.

Appeal

Should either Ms Nicholson or Scottish Borders Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement
7 October 2014

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

17 Notice that information is not held

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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